IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-75

LEON W. KNIGHT, ET AL.,
Petitioners,

v.

THE HONORABLE GERALD W. HEANEY, UNITED STATES CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND EARL R. LARSON AND DONALD D. ALSOP, UNITED STATES DISTRICT JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA,
Respondents.

MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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16 July 1979

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Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS AND/OR PROHIBITION

Pursuant to Rule 31(1) of the Rules of this Court, Petitioners Leon W. Knight, *et alia,* respectfully move for leave to file their annexed Petition for Extraordinary Writ.

Petitioners further move this Court to order the Honorable Gerald W. Heaney, United States Circuit Judge of the United States Court of Appeals for the Eighth Circuit, and Earl R. Larson and Donald D. Alsop, United States District Judges of the United States District Court for the District of Minnesota, in

their capacities as Judges of the United States District Court for the District of Minnesota, to show cause why an extraordinary writ should not issue against them.

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Respondents.

PETITION FOR MANDAMUS

AND/OR PROHIBITION

Petitioners Leon W. Knight, *et alia,* respectfully petition this Court to issue an extraordinary writ in the nature of mandamus and prohibition, directed to the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, United States Circuit and District Judges, respectively, sitting as a three-judge United States District Court in the District of Minnesota, and requiring said Judges: (i) to vacate their order of 4 April 1979, (ii) to vacate the order of 13 October 1978 issued by the Honorable Donald D. Alsop, and (iii) to order that Petitioners have the dis-

covery they requested in their Motion to Rescind the Court's order of 13 October 1978, made before the three-judge District Court and denied in its order of 4 April 1979, and such further discovery and other relief as the circumstances warrant.

OPINIONS BELOW

The District Court entered no opinions in connexion with its orders of 4 April 1979 and 13 October 1978.[1]

The opinion of the United States Court of Appeals for the Eighth Circuit, granting a petition for writ of mandamus to compel the convention of a three-judge court in this case, is reported at 535 F.2d 466.

JURISDICTION

On 19 December 1974, Petitioners filed their complaint for injunctive relief in the United States District Court for the District of Minnesota, requesting a statutory three-judge court pursuant to 28 U.S.C. § 2281 (1970).[2] And on 30 January 1975, they filed

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[1] The orders appear at Petitioners' Appendices (A.) 21-22 and 421-23 respectively. The District Court issued the earlier order orally from the Bench on 13 October 1978; the written order, however, is dated 16 October 1978.

[2] § *2281. Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

their amended complaint with the same request. A. 5.

On 13 February 1975, Petitioners moved the convention of a three-judge court. The District Court, *per* the Honorable Donald D. Alsop, heard Petitioners' motion on 3 March 1975. On 23 December 1975, the District Court filed its memorandum-opinion and order denying the motion. A. 5-6.

Petitioners sought review of the District Court's order by petition for extraordinary writ in the United States Court of Appeals for the Eighth Circuit. On 17 May 1976, that Court commanded the District Court by writ of mandamus to convene the three-judge panel.[3] On 26 May 1976, the Honorable Floyd R. Gibson, Chief Judge, United States Court of Appeals for the Eighth Circuit, designated the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop to hear the constitutional issues raised in Petitioners' amended complaint. A. 7.

On 12 August 1976, Congress repealed 28 U.S.C. § 2281, but provided that the repeal "shall not apply to any action commenced on or before [that date]".[4]

On 4 April 1979, the District Court, *per* the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, entered the order of which Petitioners complain. A. 16-17.

Under 28 U.S.C. §§ 1253 and 2281 (1970), this Court has exclusive appellate jurisdiction over the merits of the constitutional claims for injunctive relief that Petitioners raise in their amended complaint. Therefore,

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[3] Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976).

[4] Pub. L. 94-381, § 7, 90 Stat. 1119, 1120.

procedurally, it has exclusive jurisdiction under the All Writs Act, 28 U.S.C. § 1651 (1970), to hear their Petition for Extraordinary Writ.[5]

Substantively, this Court has jurisdiction under 28 U.S.C. § 1651 (1970) to hear the Petition in order to protect, and to give full force and effect to, its appellate authority;[6] because the Petition concerns the interpretation and enforcement of the Federal Rules of Civil Procedure;[7] and because the Petition involves the right of litigants to have material evidence notwithstanding a court-order against its production.[8]

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This Petition involves the Fifth Amendment to the United States Constitution, and Rules 16, 26, 30, 34, and 37 of the Federal Rules of Civil Procedure, the pertinent parts of which are as follows:

United States Constitution Amendment V

* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * * .

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[5] Tidewater Oil Co. v. United States, 409 U.S. 151, 160-61 (1972); Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 486-87, 496-97 (1968); Williams v. Simons, 355 U.S. 49 (1957); United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 201-02 (1945); De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 216-17 (1945); *In re* Stone, 569 F.2d 156, 157 (D.C. Cir. 1978); Blay v. Young, 509 F.2d 650, 650-51 (6th Cir. 1974).

[6] *E.g.*, Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943); United States v. Beatty, 232 U.S. 463, 467 (1914); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

[7] Schlagenhauf v. Holder, 379 U.S. 104, 110-11 (1964); *see Ex parte* United States, 287 U.S. 241, 245-49 (1932).

[8] *Ex parte* Uppercu, 239 U.S. 435 (1915).

Federal Rule of Civil Procedure 16

RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Federal Rule of Civil Procedure 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; * * * production of documents or things or permission to enter upon land or other property, for inspection and other purposes; * * * and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * *

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for

good cause shown, the court in which the action is pending * * * may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; * * * (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters * * * .

Federal Rule of Civil Procedure 30

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e) * * * .

* * * *

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order

of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * * *

Federal Rule of Civil Procedure 34

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served * * *.

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and per-

forming the related acts. * * * The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Federal Rule of Civil Procedure 37

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS.

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 * * *, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. * * *

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. * * *

QUESTION PRESENTED

Does a District Court abuse its discretion and usurp power under Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amendment to the United States Constitution, when it:

A. *sua sponte* and for no articulated reason, enters an order terminating discovery in a complex civil case, even though the parties from whom discovery was sought requested no, and made no showing of good cause for a, protective order; and

B. without either hearing or opinion, sustains that order in the face of an unrefuted showing by the parties seeking discovery that

1. material evidence exists in the exclusive possession of the parties from whom discovery was sought;

2. officials and staff-personnel of the latter parties have testified falsely, evasively, or incompletely under oath in depositions;

3. the latter parties and their attorneys have willfully withheld evidence that the parties seeking discovery requested, and that the Court ordered, be produced; and

4. the parties from whom discovery was sought have destroyed and may be destroying evidence?

STATEMENT OF THE CASE

Petitioners are twenty faculty-members of the Minnesota community colleges who brought this action in the United States District Court for the District of Minnesota, contending that the provisions of the Minnesota Public Employment Labor Relations Act (PELRA) requiring them as a condition of public employment to deal with the Minnesota State Board for Community Colleges solely through an organization of employees designated their "exclusive representative" are repugnant, on their face or as applied, to the United States Constitution. Petitioners' amended complaint names as defendants the Minnesota Community College Faculty Association (MCCFA), an employee-organization certified as Petitioners' exclusive representative under the PELRA; its affiliates, the National Education Association (NEA), the Minnesota Education Association (MEA), and the Independent Minnesota Political Action Committee for Education (IMPACE); various former and present officials and staff-personnel of those organizations; and officials of the State of Minnesota and the community colleges who administer the PELRA. The amended complaint alleges federal subject-matter jurisdiction under 28 U.S.C. § 1343 and 49 U.S.C. §§ 1983, 1985(3), 1986, and 1994 (1970).

Petitioners intend to prove that NEA, MEA, MCCFA, IMPACE, and their affiliates constitute a single, integrated organization that styles itself the United Teaching Profession (UTP) and operates throughout the United States.[9] The UTP, Petitioners contend, is substantially involved at the local, state, and national levels in the campaigns of candidates for election to public office, lobbying and other attempts to influence governmental action, propaganda and agi-

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[9] Dr. Craig E. Schneier, Assistant Professor of Organization Behavior and Personnel Administration at the University of Maryland, testified extensively under oath, as Petitioners' expert witness, concerning the structure and character of the UTP. On the basis of his academic training, his experience as a private consultant in the area of organizational behavior and analysis, his review of the scholarly literature of organizational science, and his analysis of numerous documents from NEA, MEA, MCCFA, and IMPACE, Dr. Schneier offered his expert opinion that: (i) The UTP is a formal, complex organization consisting of various "units" or "levels", of which NEA constitutes the national level, MEA and MCCFA represent numerous affiliates at the state and local levels, respectively, and IMPACE represents numerous state-level political-action committees. (ii) The UTP has differentiated itself into local, state, and national levels in order to deal effectively with various jurisdictions of government, including local school boards, state legislatures, and the United States Congress. And (iii) although geographically differentiated, each unit of the UTP is an integral element of a single, nationwide organization; from the perspective of organizational science, NEA, MEA, MCCFA, and IMPACE are not separate and independent entities, but interdependent parts of the same entity. A. 62-63.

The UTP is not formally cited in Petitioners' amended complaint because it exists in and through the mutual affiliation-agreements and cooperative activities among NEA, MEA, MCCFA, and IMPACE *inter alia;* and these sub-entities alone are amenable to legal process. None the less, the UTP is the real defendant in this case, because Petitioners do not complain of what NEA, MEA, MCCFA, and IMPACE each do separately, but of what they all do cooperatively through the intricate network of relationships that integrates them in the UTP.

tation, litigation, and coalitions with sundry political organizations, groups, and movements. Furthermore, assert Petitioners, these political activities are essential, in the organization's own view, to achieve its goals.[10]

For that reason, Petitioners claim the UTP constitutes a political-action organization indistinguishable, for purposes of constitutional law, from a political party. And therefore, they say, under this Court's decision in *Elrod* v. *Burns,* 427 U.S. 347 (1976), the PELRA is unconstitutional in so far as it requires Petitioners, as a condition of public employment, to accept the UTP or any of its units or levels as their "spokesman", "sponsor", or "representative" for any purpose.

In their complaint, amended complaint, and motion of 13 February 1975, Petitioners requested a statutory three-judge court to determine the appropriateness of injunctive relief for their constitutional claims. On 28 February 1975, the District Court, *per* the Honorable Donald D. Alsop, heard arguments on Petitioners' motion and the motion of defendants NEA, MEA, MCCFA, and IMPACE to stay or dismiss the action. Then, on 17 March 1975, the District Court ordered all discovery suspended until resolution of defendants' motion. A. 5-6.

Seven months later, on 24 October 1975, Petitioners moved the District Court to open discovery; but the Court denied their motion. A. 6.

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[10] On characterizing the listed activities as "political", and defining "substantial" and "essential", *see* Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293, 323-44, 344-49 (1978).

On 23 December 1975, the District Court, *per* the Honorable Donald D. Alsop, denied Petitioners' motion to convene a three-judge court. Petitioners immediately sought reversal of this order by extraordinary writ in the United States Court of Appeals for the Eighth Circuit. In the interim, on 31 March 1976, the District Court denied Petitioners' further motion to compel, and granted the UTP's motion to continue the suspension of, discovery. A. 6, 7.

On 17 May 1976, the Court of Appeals issued a writ of mandamus, commanding the District Court to convene a three-judge court. And on 26 May 1976, the Honorable Floyd R. Gibson, Chief Judge of the United States Court of Appeals for the Eighth Circuit, designated the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop as the three-judge panel. A. 7.

On 10 June 1976, the District Court ordered that discovery commence. A. 8. From then until discovery terminated pursuant to court-order on 31 December 1978, Petitioners worked to prove the UTP's substantial and essential involvement in political activism.

From the onset of discovery, however, the UTP interposed one obstacle after another to disclosure of its activities.[11] For example, Petitioners' first deponent,

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[11] The following narration of facts rests upon record-evidence collected in the memorandum Petitioners submitted to the District Court in support of their motion to extend discovery. A. 83-323. This document and the several responsive memoranda before the District Court are appropriately included in Petitioners' Appendices because cumulatively they contain all the evidence in issue. *Compare and contrast* Aquascutum of London, Inc. v. S.S. American Champion, 426 F.2d 205, 213 n.6 (2d Cir. 1970).

Accompanying their memorandum-in-chief to the District Court,

Ralph Chesebrough, staff-man of MEA and Executive Directer of MCCFA, testified to ignorance of how IMPACE solicits MCCFA's members for monetary

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Petitioners filed nine volumes of exhibits and affidavits. These have not been reproduced in Petitioners' Appendices because: (i) The UTP did not claim below that Petitioners' memorandum-in-chief misquotes any of the deposition-transcripts, or that any of the UTP's documents to which Petitioners refer in that memorandum are not authentic or do not contain the language Petitioners quote. (ii) The UTP did not file any counter-affidavits impugning the truthfulness of Petitioners' affiants. And (iii) the UTP did not object to Petitioners' submission of any of the deposition-transcripts, documents, or affidavits. Objections not proffered below are unavailing now. *E.g.*, Noonan v. Caledonia Mining Co., 121 U.S. 393, 400 (1887).

In addition, the UTP may not submit any other evidence in this Court. Petitioners' Appendices contain everything the parties called to the attention of the District Court on the motion to extend discovery, and therefore constitute the complete and sufficient record here. *See, e.g.*, Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp., 286 F.2d 697, 698 (5th Cir. 1961). The UTP must be satisfied with that on which it elected to rely below. Morrissey v. Brewer, 408 U.S. 471, 475-77 (1972); *accord*, Economic Development Corp. v. Model Cities Agency, 519 F.2d 740, 744 (8th Cir. 1975) (Heaney, J.); *In re* Stolkin, 471 F.2d 1331, 1340-41 (7th Cir. 1973); United States *ex rel.* Bradshaw v. Alldredge, 432 F.2d 1248, 1250 (3d Cir. 1970); Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970); Miller v. Avirom, 384 F.2d 319, 321-22 & nn.8-12 (D.C. Cir. 1967). Neither affidavits, nor depositions, briefs, oral arguments of counsel, or other documentary materials may now be used to interject purported evidence into this case. *Affidavits:* Russell v. Southard, 53 U.S. (12 How.) 138, 158-59 (1851); Stearns v. Hertz Corp., 326 F.2d 405, 408 (8th Cir.) (Blackmun, J.), *cert. denied*, 377 U.S. 934 (1964); United States v. Cannon, 534 F.2d 139, 140 (9th Cir.), *cert. denied*, 425 U.S. 991 (1976); Garcia v. American Marine Corp., 432 F.2d 6, 7-8 (5th Cir. 1970). *Depositions:* United States v. Knight's Administrator, 66 U.S. 488, 489-90 (1861); Jaconski v. Avisun Corp., 359 F.2d 931, 936 n.11 (3d Cir. 1966); Foley Lumber Industries, Inc., *supra*, 286 F.2d at 698. *Briefs:* Morrissey, *supra*, 408 U.S. at 475-77. *Oral arguments:* Hassenflu v. Pyke, 491 F.2d 1094, 1095 (5th

contributions to the campaigns of candidates for public office. Yet, other discovery later identified Chesebrough as an important cog in IMPACE's mechanism of fund-raising among community-college faculty. A. 319-22.

Joseph Letorney, staff-man of NEA, testified evasively about his activities as an "election pro" in recruiting and organizing members of NEA to work in the campaigns of candidates for public office. And, as subsequent depositions of other witnesses established, he testified falsely concerning participation by NEA's staff-personnel in the 1976 Democratic National Convention. A. 247-59 & n.108.

Gene Mammenga, Director of MEA's Governmental Relations Department, testified that he had not participated in the 1976 Carter-Mondale campaign, and knew of no one from MEA who had. Petitioners later discovered, however, that following the campaign MEA's President received a letter from President-elect Jimmy Carter "pay[ing] tribute to Gene Mam-

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Cir. 1974). *Other materials:* New Haven Inclusion Cases, 399 U.S. 392, 450 n.66 (1970); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 n.55 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 414 F.2d 872, 875-76 (5th Cir. 1969).

Moreover, because the UTP did not refute, and the District Court made no findings of fact and issued no opinion contradicting, Petitioners' assertions, this Court should presume that the facts Petitioners outline are true. *See, e.g.*, Williams v. Kaiser, 323 U.S. 471, 473-74 (1945); House v. Mayo, 324 U.S. 42, 45 (1945); IBM Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975); Estate of Murdoch v. Pennsylvania, 432 F.2d 867, 870 (3d Cir. 1970). Of course, since constitutional rights are implicated here, this Court may examine the evidence itself and draw its own conclusions. *E.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971).

menga * * * who made such generous contributions of his time and energy on behalf of the Carter-Mondale ticket". A. 219-22.

Neil Sands, who held various positions in MCCFA, and Roger Johnson, member of MCCFA and Chairman of IMPACE, both testified that MEA's cadre of political activists, the "1340 Club/Committee", had never had any significant existence, or had become "defunct". Yet, as later discovery showed, both Sands and Johnson recruited MCCFA members for the "1340" organization; and, even as they were testifying, "1340" operatives were engaged in extensive political activities throughout Minnesota. A. 313-18.

Simultaneously with these and other depositions, pursuant to Federal Rule of Civil Procedure 36 Petitioners requested the UTP to admit its substantial involvement in partisan politics, lobbying, propaganda and agitation, litigation, and political coalitions. The UTP denied a majority of these requests, however, notwithstanding dispositive evidence of their truthfulness in its own publications and document-files, and in deposition-testimony of its officials and staff-personnel. A. 83-137.

By the Summer of 1978, then, Petitioners tentatively concluded that NEA, MEA, MCCFA, IMPACE, and their officials, staff-personnel, and attorneys had conspired to "stonewall" and "cover-up" the facts of the UTP's political activism. To expose the UTP's attempts illegally to suppress evidence, Petitioners employed a private detective, who infiltrated a political campaign in Minnesota in September, 1978, and discovered an NEA staff-man, R. Dick Vander Woude, operating a telephone-bank under an assumed name on

behalf of a candidate for federal office. Even more revealing, the detective then interviewed Kenneth Bresin, Assistant Director of MEA's Governmental Relations Department, who informed him that Vander Woude's active (albeit surreptitious) role, and Bresin's relative inactivity, in the campaign resulted from instructions of "NEA's attorneys" in connexion with this very case. A. 259-97.

Before Petitioners could depose either Bresin or Vander Woude, the District Court ordered a "pretrial" conference. At the ensuing hearing on 13 October 1978, *sua sponte* and without any motion for a protective order, the Honorable Donald D. Alsop closed Petitioners' discovery effective 31 December 1978. In connexion with this order, the District Court articulated no reason for terminating discovery, found no facts, and did not determine that NEA, MEA, MCCFA, or IMPACE had shown good cause within Federal Rule of Civil Procedure 26(c) for a protective order. A. 11-12; *see* A. 437-56.

Petitioners, however, did not then oppose the order of 13 October 1978 for three reasons: First, absent deposition-testimony from Bresin, Vander Woude, and the investigator, the pattern of suppression of evidence shown by the testimony of Chesebrough, Mammenga, Sands, and Johnson, and by the UTP's denials of the requests to admit, was still fragmentary. Second, prematurely to have revealed the private detective's activities would have alerted the UTP to what he had uncovered. And third, Petitioners could not be certain that the deponents they intended to call prior to 31 December 1978—including Bresin, Vander Woude, the chief operatives of NEA's and MEA's political-action and public-relations programs, and NEA's Archivist

—would not, after all, satisfy their duties under state and federal law to tell the whole truth and produce all the documentary evidence Petitioners would demand pursuant to subpoenae *duces tecum*.

Subsequent to 13 October 1978, though, the UTP employed its tactics of "stonewalling" and "covering-up" even more ruthlessly than before. Both Bresin and Vander Woude, for example, attempted to conceal or minimize the nature and extent of their involvement in the September, 1978, election in Minnesota. A. 259-97. The testimony of Sue Zagrabelny, an MEA staff-woman who had long-standing experience with the organization's political programs and had been a key figure in establishing the "1340" operation, was more candid—but further confirmed that Mammenga, Sands, and Johnson had not testified truthfully. A. 222, 316-17. Most replete with false and incomplete testimony, though, were the depositions of Stanley McFarland, Robert Harman, Rosalyn Baker, and Susan Lowell, NEA's Director of Governmental Relations, Associate Director of Governmental Relations, Manager of Contacts with Federal Agencies, and Director of Communications, respectively.

Despite the UTP's "cover-up", Petitioners established that, at least twenty-two months before the 1976 general elections, NEA's Governmental Relations Department prepared a master-plan for mobilizing UTP members throughout the United States as campaign-workers for a presidential candidate, and for coordinating this activity with the candidate's campaign-staff. Yet McFarland denied that a master-plan existed, or that the UTP began planning its intervention in the 1976 presidential election prior to the Summer of that year. He admitted that NEA requested its state-

level affiliates to submit presidential-election plans in mid-1976, but professed ignorance of what the plans entailed, or what happened to them. Harman, too, claimed no recollection of these plans or their utilization, although McFarland identified him as the man in charge of dealing with them. Furthermore, the record indicates that NEA planned extensively with regard to the presidential election, on its own and with its state-level affiliates, from before 1975 to the 1976 general elections—and that both McFarland and Harman were central actors in the development and implementation of the UTP's campaign-operation. A. 137-43, 195-213, 412-13 n.2.[12]

NEA's master-plan for the 1976 presidential election foresaw selecting UTP personnel as liaisons with the candidate's campaign-staff. McFarland admitted that NEA supplied Carter-Mondale campaign-coordinators with names of the UTP's officials and staff-personnel throughout the United States who might cooperate with the campaign. But, incredibly, he claimed no knowledge of what cooperation was intended or

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[12] Petitioners unearthed NEA's master-plan fortuitously. An internal NEA memorandum produced during discovery referred to one C.T. Shotts, a doctoral candidate studying the history of NEA's political-action arm, the National Education Association Political Action Committee (NEA-PAC). Through University Microfilms, Petitioners acquired a copy of Shotts' completed thesis, "The Origin and Development of the National Education Association Political Action Committee, 1969-1976". As the title states, the thesis dealt exclusively with NEA-PAC. But Appendix G, added apparently as an afterthought, reproduced the text of NEA's "Governmental Relations Program to Implement the NEA Presidential Endorsement Procedure" (dated 13 January 1975), the outline of NEA's 1976 presidential-campaign-strategy. *See* A. 137-43. Unfortunately, Petitioners received the Shotts thesis only *after* deposing McFarland, Baker, Harman, and Lowell.

occurred. And Harman would not even admit knowing how Carter-Mondale campaign-coordinators contacted certain of NEA's state-level affiliates identified in NEA's own publication. A. 137-43, 214-19.

NEA's master-plan for the 1976 presidential election also involved recruiting UTP members as campaign-workers for the candidate. McFarland admitted that the UTP intended to mobilize its members for the Carter-Mondale ticket; but he denied that NEA distributed kits containing directions on how its local-level affiliates could organize campaign-workers. Lowell, too, claimed not to know what the kits—admittedly produced by NEA's Communications Department—contained. She also testified that she knew nothing about what UTP members did as Carter-Mondale campaign-workers. Yet, inconsistently, she conceded that Harman had provided her with information on a considerable range of campaign-activities by members on behalf of Carter-Mondale. Harman, furthermore, denied that NEA had assigned, or even made contingency-plans to assign, any of its staff-personnel to the Carter-Mondale campaign. But NEA's master-plan contained such assignations; and Harman had discussed such a strategy with his staff in May of 1976. A. 137-43, 223-28.

The UTP's assistance to the Carter-Mondale ticket in 1976 included its "member-contact program": the mobilization of some 1,100 staff-personnel throughout the United States to establish telephone-banks for some 75,000 callers to solicit the votes of hundreds of thousands of the UTP's members on behalf of the ticket. McFarland, however, denied knowledge of that program, of any get-out-the-vote activities by NEA—or even of any campaign-activities of the very staff-

personnel his Department had assigned to establish, implement, and report on the "member-contact" program. Indeed, in the face of an NEA document referring to get-out-the-vote materials, McFarland claimed no recollection of what had happened. Baker, too, professed a lack of memory about the "member-contact" program—although, as Harman later admitted, she was primarily responsible for implementing it. A. 229-34.

Under its sophisticated budgeting system, NEA routinely evaluates its activities. None the less, Harman testified that assessments of UTP members' involvement in the 1976 Carter-Mondale campaign, and other political campaigns, were non-existent. McFarland, though, said that Harman had reported to him what transpired in various states (although McFarland claimed not to remember specifics). Lowell admitted that Harman had been her main source of information about what UTP members did for the Carter-Mondale ticket (although, again, she claimed no memory of details). And Vander Woude recalled that he had provided Harman with on-going assessments of UTP members' campaign-involvement. In addition, Harman professed no recollection of post-election surveys of the extent to which NEA's affiliates or members had participated in the 1976 campaign—or in the 1972, 1974, or 1978 campaigns, for that matter. Yet McFarland admitted that NEA had requested such information from its state-level affiliates (although he failed to remember what the assessments showed). Finally, Harman claimed no knowledge of how NEA acquired the information on its members' involvement in candidates' campaigns regularly published in its newspaper. Lowell, though, identified Harman as the primary source for these publications. A. 237-47.

Besides false and incomplete testimony, the UTP's program of "stonewalling" and "covering-up" included suppression of documentary evidence. Pursuant to Federal Rules of Civil Procedure 34 and 45, Petitioners obtained a court-order that the UTP produce the contents of the NEA Archives for inspection. But the UTP's attorneys unilaterally limited production to what they saw fit to reveal—and even admitted as much on the record in the deposition of NEA's Archivist. Moreover, besides producing only a small portion of the Archives, the UTP withheld certain other files and specifically identified documents. And its atttorneys and staff-personnel also acknowledged that files and documents that post-date the filing of Petitioners' complaint have been, or are now being, destroyed. A. 145-92.

These facts convinced Petitioners that NEA, MEA, MCCFA, IMPACE, and their officials, staff-personnel, and attorneys had conspired to proffer false, evasive, and incomplete testimony; to sequester or destroy documentary evidence; and otherwise to impede Petitioners' full discovery in this case. Therefore, on 30 December 1978, Petitioners moved the District Court under Federal Rule of Civil Procedure 37 to rescind its order of 13 October 1978, and to order that the UTP make certain files, and the NEA Archives, available for direct inspection, that certain persons be deposed for a second time before a magistrate, that certain other persons be deposed, and that the UTP pay all related fees and costs. A. 25-31. Supporting this motion, Petitioners filed a documented memorandum, together with nine volumes of exhibits and affidavits. A. 35-331. In response, the UTP filed a short memorandum replete with general denials, but devoid of specific refutations, of the facts Petitioners adduced.

A. 335-66, *and compare with Petitioners' responsive memorandum,* A. 369-95.

On 2 February 1979, the District Court, *per* the Honorable Donald D. Alsop, held a hearing. However, although all counsel were prepared to argue the merits of Petitioners' motion, the District Court denied oral argument. And no argument was allowed prior to the entry of the Court's order of 4 April 1979, over the signatures of the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, denying Petitioners' motion and commanding the parties to submit stipulations of facts, lists of exhibits and witnesses, and pretrial briefs. A. 14, 16-17, 421-23. The District Court provided no written opinion supporting its decision. Neither did it specifically find that Petitioners had not established a "cover-up" on the part of the UTP. Nor did it rule that the UTP had shown good cause under Federal Rule of Civil Procedure 26(c) for an order terminating discovery.

Petitioners then moved for dissolution or stay of the order of 4 April 1979, and for reconsideration of and hearing on their earlier motion to extend discovery. A. 427-30. On 20 June 1979, the District Court, *per* the Honorable Donald D. Alsop, denied this motion. A. 471-72.

Petitioners now bring their Petition for Extraordinary Writ to review the District Court's orders of 13 October 1978 and 4 April 1979.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for five reasons:

First, the District Court's orders of 13 October 1978 and 4 April 1979 raise questions, heretofore never ad-

dressed by any federal appellate court, concerning important aspects of discovery under Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amendment to the United States Constitution. Moreover, the District Court's actions demonstrate the need for this Court to issue guidelines and standards to resolve the problems of discovery that have arisen in this case, and to minimize future error and uncertainty in the application of the Rules to other cases.[13]

Second, the District Court's orders may encourage an erroneous practice likely to recur with increasing frequency. If permitted, this practice will curtail and distort the application of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37 in a manner both uncontemplated by this Court and Congress and unconstitutional—in effect, perverting and nullifying these provisions in favor of malfactors, rather than correcting wrongdoers' misuse of the Rules.[14]

Third, the District Court's orders are so egregiously erroneous, and so inconsistent with precedent and any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and the Fifth Amend-

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[13] *See* Schlagenhauf v. Holder, 379 U.S. 104, 111-12 (1964); General Motors Corp. v. Lord, 488 F.2d 1096, 1099 (8th Cir. 1973); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524-25 (D.C. Cir. 1975).

[14] *See* La Buy v. Howes Leather Co., 352 U.S. 249, 258 (1957); Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701, 705-08 (1927); Sanderson v. Winner, 507 F.2d 477, 479 (10th Cir. 1974), *cert. denied sub nom.* Nissan Motor Corp. v. Sanderson, 421 U.S. 914 (1975); Buffington v. Wood, 351 F.2d 292, 294 & n.4 (3d Cir. 1965).

ment to the United States Constitution, that their entry constitutes an usurpation of power.[15]

Fourth, although beyond its powers and concerned only with matters outside the merits of the case, the District Court's orders, absent timely intervention by this Court, will remain in force and will substantially and irreparably injure Petitioners throughout the future course of proceedings below, and on appeal.[16]

Fifth, by preventing Petitioners from developing a complete factual record in support of their constitutional claims, the District Court's orders may subvert, or even defeat, this Court's appellate jurisdiction over those claims.[17]

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[15] *See* McDonnell Douglas Corp. v. United States District Court, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied sub nom.* Flanagan v. McDonnell Douglas Corp., 425 U.S. 911 (1976); Kerr v. United States District Court, 511 F.2d 192, 196 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976); *In re* Estelle, 516 F.2d 480, 488 (5th Cir. 1975) (Godbold, J., concurring), *cert. denied*, 426 U.S. 925 (1976).

[16] *See* De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 216-17 (1945); Maryland v. Soper, 270 U.S. 9, 29-30 (1926); *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 376 (1868); Pfizer, Inc. v. Lord, 456 F.2d 545, 547-48 (8th Cir. 1972); IBM Corp. v. Edelstein, 526 F.2d 37, 41 (2d Cir. 1975); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 525-26 (D.C. Cir. 1975); United States v. Hemphill, 369 F.2d 539, 543 (4th Cir. 1966).

[17] *See* McClelland v. Carland, 217 U.S. 268, 280 (1910); United States v. United States District Court, 334 U.S. 258, 263 (1948); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943); United States v. Beatty, 232 U.S. 463, 467 (1914); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 525-26 (D.C. Cir. 1975).

I. The District Court's condonation of the United Teaching Profession's suppression of material evidence in this case is an unprecedented misapplication of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37.

The District Court had no power under Federal Rules of Civil Procedure 16, 26(c), 30(d), 34, and 37(a), and under the Fifth Amendment to the United States Constitution, to terminate discovery in this case, *sua sponte* and without a showing of good cause by the UTP, after Petitioners made an unrefuted demonstration that:

1. material evidence exists in the UTP's exclusive knowledge or possession;

2. officials and staff-personnel of the UTP testified falsely, evasively, or incompletely under oath in depositions;

3. the UTP and its attorneys willfully withheld documentary evidence that Petitioners requested, and that the District Court ordered, be produced pursuant to Federal Rules of Civil Procedure 34 and 45;

4. the UTP admittedly destroyed, and may be destroying, documentary evidence that post-dates the filing of Petitioners' complaint; and

5. this wrongdoing is the product of concerted action among the UTP and its officials, staff-personnel, and attorneys, designed to impede the administration of justice by denying Petitioners access to facts necessary to prosecute thir constitutional claims.[18]

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[18] Both direct evidence and the logic of the situation establish a conspiracy among the UTP and its counsel. First, the disclosures made by MEA's staff-man Bresin to Petitioners' private investiga-

Moreover, because of the extraordinary circumstances of this case, the District Court had a duty under Federal Rule of Civil Procedure 37(a) and the Fifth Amendment to order the UTP to make further discovery to purge the record of its previous misconduct, and to enable Petitioners to adduce all the facts the Federal Rules entitle them to bring forward.

Enforcement of this absence of power and duty requires construction and application of Federal Rules of Civil Procedure 16, 26(c), 30(d), 34, and 37(a), and the Fifth Amendment, in a new context. To Petitioners' knowledge, no federal appellate tribunal has yet addressed this problem. As an issue of first impres-

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tor directly link "NEA's attorneys" to efforts of MEA and NEA to disguise what their staff-men Bresin and Vander Woude did in the 1978 elections. A. 264-66, 287-97.

Second, the central actors in the withholding of documents that Petitioners requested be produced, and in the bad-faith responses to Petitioners' requests to admit, were the UTP's counsel and their assistants. A. 143-91, 84-88.

Third, in the face of Petitioners' documented charges, the UTP's counsel have done nothing to explain or attempt to rehabilitate any of the deponents who testified falsely, evasively, or incompletely concerning the UTP's involvement in political activism. *See* A. 382-87.

And fourth, it is unreasonable to presume that Baker, Bresin, Chesebrough, Harman, Johnson, Letorney, Lowell, Mammenga, McFarland, Sands, and Vander Woude all took it upon themselves, either individually or in combination, to testify as they did. This group contains persons connected with each level of the UTP: NEA (Baker, Harman, Letorney, Lowell, McFarland, Vander Woude), MEA (Bresin, Chesebrough, Mammenga), MCCFA (Chesebrough, Johnson, Sands), and IMPACE (Bresin, Johnson, Mammenga). That these people, who occupy official or staff positions throughout the UTP, would testify as they did, without consulting counsel or in defiance of counsels' instructions, staggers the imagination.

sion, then, it is appropriate for consideration under the All Writs Act.[19]

What this case does not entail reveals its unprecedented character. Petitioners do not seek to adduce facts without legal significance, or proofs without effect at trial.[20] Rather, the District Court denied them an opportunity fully to establish the nature and extent of the UTP's political activism, particularly in the campaigns of candidates for election to public office—matters central to proof that the UTP is a political-action organization and therefore disqualified from imposing itself on Petitioners under color of law as their "spokesman" or "sponsor". A. 46-80. Neither do Petitioners demand the production of documents they already have.[21] Rather, the District Court foreclosed access to documents Petitioners know exist in the UTP's exclusive possession, have requested it produce, and have not received because of its misconduct. A. 143-90. Nor have Petitioners failed to examine witnesses, to question them about documentary evidence, or to attack their credibility.[22] Rather, the District Court disallowed further examinations even though

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[19] Schlagenhauf v. Holder, 379 U.S. 104, 110-11 (1964); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524-25 (D.C. Cir. 1975); United States v. United States District Court, 444 F.2d 651, 655-56 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972); Miller v. United States, 403 F.2d 77, 79 (2d Cir. 1968); Atlass v. Miner, 265 F.2d 312, 313-14, 319 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960).

[20] *Contrast, e.g.*, Murphy v. Houma Well Service, 413 F.2d 509, 511 (5th Cir. 1969).

[21] *Contrast, e.g.*, Price v. Lake Sales R.M., Inc., 510 F.2d 388, 392 (10th Cir. 1974).

[22] *Contrast, e.g.*, United States v. Bostic, 336 F. Supp. 1312, 1314-15 (D.S.C.), *aff'd*, 473 F.2d 1388 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

the depositions bristle with false, evasive, and incomplete testimony; and with admissions that the UTP has withheld and destroyed material documents that post-date the filing of Petitioners' complaint. A. 190-323. Nor does the testimony of the UTP's officials and staff-personnel, and the non-production of its documents, reflect mere confusion, inadequate record-keeping, or honest mistakes on their part.[23] Rather, the District Court terminated discovery notwithstanding Petitioners' unrefuted demonstration that the UTP has concealed evidence. Nor has their own inaction, and not the UTP's misconduct, injured Petitioners.[24] Rather, in the face of Petitioners' exposure of its activities, the District Court rewarded the UTP, the very party that induced witnesses to testify falsely and that withheld and destroyed documents it had a duty to produce. Nor did Petitioners' request for further discovery rest on mere assertions, and not upon evidence, of the UTP's wrongdoing.[25] Rather, the District Court discounted over two hundred pages of evidence substantiating Petitioners' charges, without any refutation by the UTP, or any finding by the Court itself that even one of those charges is without foundation. Nor, finally, did the District Court judge the credibility of the UTP's officials and staff-personnel by first-hand observation.[26] Rather, the Court entered its order

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[23] *Contrast, e.g.*, United States v. Rexach, 41 F.R.D. 180, 185 (D. Puerto Rico 1966).

[24] *Contrast, e.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 398, 420-23 (1923).

[25] *Contrast, e.g.*, Parker v. Checker Taxi Co., 238 F.2d 241, 244 (7th Cir. 1956).

[26] *Contrast, e.g.*, Assman v. Fleming, 150 F.2d 332, 336-37 (8th Cir. 1947); Atchison, T. & S.F. Ry. v. Barrett, 246 F.2d 846, 849-50 (9th Cir. 1957).

of 4 April 1979 without seeing a single witness, hearing oral argument, or issuing an opinion that suggests any familiarity with what has transpired during the course of discovery in this case.

Decisions under Federal Rules of Civil Procedure 16, 26, 30, and 37 also illuminate the unprecedented misconception of its power the District Court entertained. A primary objective of Rule 16, for example, is to eliminate the "sporting theory of justice", by replacing traditional strategies of concealment, disguise, guile, sham, and legal sparring with the policy of full disclosure.[27] The Rule envisions an expedited trial that adjudicates honest disputes of facts on their merits, rather than on the basis of tactical advantage and surprise.[28] Yet such a trial presupposes complete discovery—implying that Rule 16 can be, as it has been, used to determine what discovery is necessary, and to compel disclosure of relevant information.[29] Here however, without any explanation the District

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[27] *E.g.*, Clark v. Pennsylvania R.R., 328 F.2d 591, 594 (2d Cir.), *cert. denied*, 377 U.S. 1006 (1964); Bandlow v. Rothman, 278 F.2d 867, 868-69 (D.C. Cir. 1960); Cherney v. Holmes, 185 F.2d 718, 721 (7th Cir. 1950); Sunderland, "The Theory and Practice of Pre-Trial Procedure", 36 *Mich. L. Rev.* 215, 226 (1937).

[28] *E.g.*, Wallin v. Fuller, 476 F.2d 1204, 1208 (5th Cir. 1973); FDIC v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971); Manbeck v. Ostrowski, 384 F.2d 970, 975 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 966 (1968); Walker v. West Coast Fast Freight, Inc., 233 F.2d 939, 941 (9th Cir. 1956); 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1522, at 567 (1970).

[29] Buffington v. Wood, 351 F.2d 292, 297-98 (3d Cir. 1965); United States v. Maryland and Virginia Milk Producers Ass'n, 22 F.R.D. 300, 302 (D.D.C. 1958); Goldberg v. Ann-Vien, Inc., 29 F.R.D. 6, 7 (N.D. Ga. 1961); Hertz v. Graham, 23 F.R.D. 17, 19 (S.D.N.Y. 1958), *aff'd*, 292 F.2d 443, *cert. denied*, 368 U.S. 929 (1961).

Court denied Petitioners the very discovery they proved necessary.[30] The Court's order of 4 April 1979, then, does not advance the purpose of Rule 16. Quite the contrary: Instead of interring the "sporting theory of justice", the order resurrects it. Instead of penalizing concealment, the order rewards it. Instead of simplifying and sharpening the factual issues in the case, the order complicates and beclouds them. Instead of facilitating presentation of Petitioners' proofs at trial, the order frustrates it. And instead of expediting proceedings, the order delays them, and makes unlikely the resolution in a single trial and appeal of the constitutional issues Petitioners raise.[31]

Similarly, the District Court misconceived its power under Rules 26(c) and 30(d). In complex litigation particularly, a trial-court should not curtail discovery unless some limitation is essential.[32] Indeed, for a protective order a party must demonstrate practical and substantial reasons, based on specific facts drawn from testimony and other appropriate sources, rather than

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[30] The District Court did not predicate, nor could it rationally have predicated, its sweeping preclusion of discovery on the irrelevance to their theory of the case of the testimony and documents Petitioners seek. *Contrast* New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 20 F.R.D. 36, 37 (S.D.N.Y. 1955), *with* A. 46-80. Indeed, it articulated no specific reason for terminating discovery, either at the hearings of 13 October 1978 and 2 February 1979, or in its orders of 13 October 1978 and 4 April 1979.

[31] *See infra* pp. 42, 46, 48-51.

[32] *E.g.*, General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); Stonybrook Tenants Ass'n, Inc. v. Alpert, 29 F.R.D. 165, 167 (D. Conn. 1961); United States *ex rel.* Edelstein v. Brussell Sewing Machine Co., 3 F.R.D. 87, 88 (S.D.N.Y. 1943).

on unsupported contentions of counsel.[33] Here, however, apart from the UTP's grumbling before the District Court that it had already provided "enough" discovery, the record contains no showing of any cause or reason—let alone good cause—for terminating discovery in this case.[34] Just the opposite: Petitioners would be entitled to hold depositions even if the trans-

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[33] *E.g.*, General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); Neonex International Ltd. v. Norris Grain Co., 338 F. Supp. 845, 854 (S.D.N.Y. 1972); Apco Oil Corp. v. Certified Transportation, Inc., 46 F.R.D. 428, 431-32 (W.D. Mo. 1969); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (W.D. Mo. 1950); Stankewicz v. Pillsbury Flour Mills Co., 26 F. Supp. 1003, 1004 (S.D.N.Y. 1939).

[34] At the 13 October 1978 hearing, the UTP's counsel told the District Court that

> [w]e have not come to your Honor in terms of seeking protective orders and the like • • • . I think [discovery] should terminate and, very frankly, if we are going to receive additional discovery requests • • • we may have to return to the Court in order to limit that discovery. We have had a lot of discovery, it has been expensive • • • . My office has spent a lot of time in Washington, D.C., looking through records there as well as here in Minnesota. We are not interested in going any further.
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> I would, I guess, urge the Court to consider cutting off discovery • • • .

A. 446-47. This statement is not a proper motion for protective order under Rule 26(c) or 30(d); and, even if it were, it would be of no importance by itself in supporting such an order. Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (W.D. Mo. 1950).

Moreover, whatever a trial-court's discretion to enter protective orders where *some* cause exists, it has no power to do so where *no* cause appears on the record. *See* Jacobowitz v. Kremer, 7 F.R.D. 110, 111 (S.D.N.Y. 1946): "The record clearly establishes that no good cause nor even any cause whatever for refraining from taking or for limiting the deposition has been shown. • • • [I]t would be an abuse of authority to interfere with the deposition being taken at this stage."

actions they intended to investigate had been conducted or confirmed in writing, and they had access to the documents.[35] How much more persuasive their position when the UTP has withheld and destroyed documents, and when its officials and staff-personnel have testified falsely, evasively, and incompletely with respect to those documents it did produce. Again, Petitioners would be entitled to conduct depositions even if the expected testimony were repetitious of information gleaned from other sources.[36] How much more convincing their position when the UTP has deprived them of evidence through repeated, unjustified refusals to produce documents and to answer questions candidly. And again, Petitioners would be entitled to conduct depositions even if the deponents asserted under oath that they had no knowledge of the subject-matter of the inquiry.[37] How compelling their position when the prior testimony of the UTP's staff-personnel establishes both their knowledge and their intent to deny or conceal that knowledge by any means.[38] In

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[35] *See* Morrison Export Co. v. Goldstone, 12 F.R.D. 258, 259 (S.D.N.Y. 1952).

[36] *See* Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).

[37] *See* Parkhurst v. Kling, 266 F. Supp. 780, 781 (E.D. Pa. 1967); Transcontinental Motors, Inc. v. NSU Motorenwerke Aktiengesellschaft, 45 F.R.D. 37, 37 (S.D.N.Y. 1968); Overseas Exchange Corp. v. Inwood Motors, Inc., 20 F.R.D. 228, 229 (S.D.N.Y. 1956).

[38] That Petitioners requested the District Court to permit the re-deposition of several of the UTP's staff-persons charged with false or evasive testimony in their first depositions is hardly extraordinary, then; rather, the circumstances necessitate such action if Petitioners are to enjoy meaningful relief. *Contrast* McNally v. Simons, 1 F.R.D. 254, 254-55 (S.D.N.Y. 1940), *with* A. 327-28; *and see infra* note 52.

short, good cause exists for an order compelling the UTP to disclose what it has withheld, concealed, and falsified—not an order rewarding those actions with a blanket of judicially imposed secrecy at odds with everything the Federal Rules of Civil Procedure were intended to accomplish.[39]

In addition, the District Court misjudged its power under Rule 34. For even under that Rule as it existed prior to 1970, with its now-abandoned requirement that a party show good cause for the production of documents, Petitioners would be entitled to the relief they sought in their motion to extend discovery. A. 27-29. After all, in the face of the UTP's withholding of numerous documents within the categories Petitioners requested be produced, and of the false, evasive, and incomplete testimony of its staff-personnel, Petitioners have established the existence of much physical evidence.[40] Petitioners have located this evidence in

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[39] *See* Banco Nacional de Credito Ejidal v. Bank of America N.T. & S.A., 11 F.R.D. 497, 499-500 (N.D. Cal. 1951):

> One primary object of the Rules is to provide for a just, speedy, and inexpensive determination of actions. In contrast, the construction urged by respondent would result in delay, expense, and inconvenience. From the record it appears that over two years have already been consumed in attempting to get this case to trial. Obstacle after obstacle has been thrown in the path of fact-finding. It is time to call a halt to such dilatory tactics. Those who come into the courts must be prepared to be as just with their adversary as they expect the courts to be with them. Artificialities, delay, obfuscation and concealment inevitably cast a pall of disrepute over bar and court alike, and turn the trial of an action into a game of chance or a contest of wits.

[40] *Compare* A. 143-90 *with* Houdry Process Corp. v. Commonwealth Oil Refining Co., 24 F.R.D. 58, 62-63, 63-64 (S.D.N.Y. 1959), *and contrast with* William A. Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487, 491-92 (W.D. Pa. 1951); *and* Condry v. Buckeye S.S. Co., 4 F.R.D. 310, 311-12 (W.D. Pa. 1945).

the UTP's exclusive possession, inaccessible to them absent court-order.[41] Petitioners have explained how this evidence is necessary to the adequate preparation of their case, and how without it they are seriously prejudiced in protecting their constitutional rights.[42] And Petitioners have proven that the UTP's officials and staff-personnel they deposed were reluctant to speak freely, or were openly hostile, evasive, or untruthful; that those deponents refused to reveal the contents of many documents discussed in their testimony; that the contents of documents they did describe are likely inconsistent with their descriptions; and that, in general, ascertainment of the true nature and extent of the UTP's political involvement is impossible without complete access to certain of its files.[43]

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[41] *Compare* A. 143-90 *with* National Utility Service, Inc. v. Northwestern Steel and Wire Co., 426 F.2d 222, 225-26 (7th Cir. 1970); *and In re* Natta, 388 F.2d 215, 219 (3d Cir. 1968), *and contrast with* Harkobusic v. General American Transportation Corp., 31 F.R.D. 264, 265 n.2 (W.D. Pa. 1962); *and* Houdry Process Corp. v. Commonwealth Oil Refining Co., 24 F.R.D. 58, 61-62 (S.D.N.Y. 1959).

[42] *Compare* A. 46-80 *with* Speedrack, Inc. v. Baybarz, 45 F.R.D. 254, 256 (E.D. Cal. 1968); *and* Roebling v. Anderson, 257 F.2d 615, 620-21 (D.C. Cir. 1958), *and contrast with* Harkobusic v. General American Transportation Corp., 31 F.R.D. 264, 266-67 (W.D. Pa. 1962).

[43] *Compare* A. 192-323, 326-27 *with* Southern Ry. v. Lanham, 403 F.2d 119, 127-29 (5th Cir. 1968); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 795 (D. Del. 1954); Goldner v. Chicago & N.W. Ry. System, 13 F.R.D. 326, 329 (E.D. Ill. 1952); *and* Hirshhorn v. Mine Safety Appliances Co., 8 F.R.D. 11, 21, 24 (W.D. Pa. 1948), *and contrast with* Scuderi v. Boston Insurance Co., 34 F.R.D. 463, 467-68 (D. Del. 1964); Guilford Nat'l Bank of Greensborp v. Southern Ry., 297 F.2d 921, 926-27 (4th Cir. 1962); McManus v. Harkness, 11 F.R.D. 402, 403 (S.D.N.Y.

The UTP, conversely, has proven nothing—instead, confessing its wrongdoing by silence, and attempting to avoid the consequences of that malfeasance by the unavailing complaints that Petitioners have "enough" evidence already, and that to produce more would be "burdensome".[44] Under the present Rule 34, the UTP must establish good cause for withholding documents Petitioners requested it produce.[45] Yet, although Petitioners have shown good cause for the further production of documents (albeit unnecessarily); and although the UTP has not refuted Petitioners' proof of its bad faith in discovery (let alone established good cause for rewarding that bad faith); the District Court nevertheless applied Rule 34 more narrowly than any court even before 1970—and in a case where its broadest application is necessary.[46]

1951); *and* Hudalla v. Chicago, M., S.P. & P.R.R., 10 F.R.D. 363, 364-65 (D. Minn. 1950).

That the necessity for direct access to the UTP's files arose primarily as a result of the non-production of documents and the depositions *following* the District Court's order of 13 October 1978 is a factor decisively militating against its order of 4 April 1979. *See* Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 50-52 (4th Cir. 1963).

[44] *Contrast* A. 335, 336-37, 338-46, 360-61 *with* Morales v. Turman, 59 F.R.D. 157, 158 (E.D. Tex. 1972); Cameo, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384, 386 (S.D. Tex. 1968); *and* United States v. American Optical Co., 39 F.R.D. 580, 586-87 (N.D. Cal. 1966) (Rule 45(d)).

[45] *E.g.*, Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76-77 (D. Mass. 1976); Zucker v. Sable, 72 F.R.D. 1, 3 (S.D.N.Y. 1975).

[46] *See* Morales v. Turman, 59 F.R.D. 157, 159 (E.D. Tex. 1972): "When important civil rights are in issue in complex litigation of widespread concern, a court must make every effort to enhance the fact-finding process available to counsel for both sides."

Finally, the District Court misunderstood the source and nature of its power under Rule 37(a). The authority to compel discovery does not license trial-courts to grant or deny benefactions to favored litigants, as they choose.[47] Instead, under the extraordinary circumstances of this case, it implicates serious issues of due process of law, as well as the proper application of the Federal Rules.[48] Yet the District Court's order of 4 April 1979 reads, in context, as if neither Rule 37(a) nor the Fifth Amendment circumscribes its actions. Quite the contrary is true, however: Rule 37 discountenances contrived "lapses of memory", evasive or incomplete answers, or other tactics witnesses use to frustrate or delay discovery.[49] How applicable that Rule here, then, where witness after witness repeatedly—and incredibly—"forgot" what he or she and the UTP did in the area of partisan politics. Again, Rule 37 disallows parties to treat discovery-proceedings as a contest in devising ruses to conceal the truth.[50] How appropriate that Rule here, then, where the UTP used one subterfuge after another to forestall discovery.

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[47] No judicial power is "an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility". *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1856); *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 377 (1868).

[48] *See infra* p. 45.

[49] *E.g.*, Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 18-19 (E.D. Pa. 1970) ("[d]iscovery procedures cannot be frustrated by such transparent sham" as "don't recall" answers), *aff'd*, 438 F.2d 1187 (3d Cir. 1971); Cromaglass Corp. v. Ferm, 344 F. Supp. 924, 927-28 (M.D. Pa. 1972); Braziller v. Lind, 32 F.R.D. 367, 367-68 (S.D.N.Y. 1963).

[50] *E.g.*, Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 614-15 (2d Cir. 1964).

And again, Rule 37 particularly disdains participation of counsel in schemes to suppress evidence.[51] How necessary that Rule here, then, where Petitioners exposed the complicity of "NEA's attorneys" in a "cover-up". In short, Rule 37 compels the relief Petitioners requested and the District Court denied, including redeposition of those witnesses who testified falsely, evasively, and incompletely;[52] the appointment of a master to preside at future depositions;[53] and unimpeded access to the UTP's files.[54]

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[51] *E.g.*, Shapiro v. Freeman, 38 F.R.D. 308, 313 (S.D.N.Y. 1965), *quoted with approval in* Palma v. Lake Waukomis Development Co., 48 F.R.D. 366, 369 (W.D. Mo. 1970):

> [The attorney] had no right whatever to impose silence or to instruct the witnesses not to answer • • • .
>
> • • • [T]hroughout the entire discovery process plaintiffs' lawyers have been acting in utmost bad faith. • • • [T]hey willfully torpedoed defendants' attempt to take a deposition ordered by this court.
>
> The Federal Rules of Civil Procedure were designed as an affirmative aid to substantive justice, and those who choose to read them restrictively do so at their peril. It is time that depositions be conducted by members of the bar in a cooperative manner, in accordance with both the letter and spirit of the rules • • • . It is clear to us that plaintiffs' attorney has no conception of his obligation to observe the rules "as an officer of the court" or otherwise. Rather, he appears to be bent on concealing vital facts or, at best, waging a war of delay, expense, harassment and frustration. There is no justification for his conduct, no basis at all for his instructing the deponents not to answer.

[52] *See* Macrina v. Smith, 18 F.R.D. 254, 258 (E.D. Pa. 1955), *and compare with* A. 29, 327-28.

[53] *See* Shapiro v. Freeman, 38 F.R.D. 308, 313 (S.D.N.Y. 1965), *and compare with* A. 29, 327-28.

[54] *See* A. 28-29, 326-27, *and contrast with* Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp., 55 F.R.D. 354, 356-57 (W.D. Mo. 1972), which indicates that Petitioners have willingly assumed a discovery-burden the UTP could not have imposed upon them.

The interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37 implicit in the District Court's order of 4 April 1979 so offends the intendment of those Rules that this Court should intervene now—not only to do justice to Petitioners while there is still time,[55] but also to forefend error and uncertainty in the application of the Rules to other cases.

II. Besides rewarding the United Teaching Profession's contempt for Federal Rules of Civil Procedure 26, 30, and 34 in this case, the District Court's sanction of its "stonewalling" and "covering-up" will encourage other unscrupulous parties to flout those Rules at every opportunity.

The District Court's misapplication of Federal Rules of Civil Procedure 16, 26, 30, 34 and 37 comes at an inopportune and dangerous moment. Mr. Justice Powell recently expressed understandable concern over "the widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation", and noted that "discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice".[56] The evidence on which this statement rests supports strict enforcement of the limitations in the federal discovery-rules where a party attempts to extend discovery oppressively.[57] But, by a parity of reasoning, it counsels an equally rigorous enforcement of those rules where a party attempts to frustrate discovery illegally. The abstraction that "extensive discovery is an abuse", however, although true in particular in-

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[55] *See infra* pp. 48-51.

[56] Herbert v. Lando, —— U.S. ——, ——, 47 U.S.L.W. 4401, 4407 (17 Apr. 1979) (concurring opinion).

[57] *See id.* at ——, 47 U.S.L.W. at 4407 (opinion of the Court).

stances, may become a rationalization against discovery in general—to the detriment of litigants, such as Petitioners, for whom comprehensive discovery is essential to protect their constitutional rights. Litigants such as NEA, MEA, MCCFA, and IMPACE—for whom comprehensive discovery means defeat—may fashion a new litigation art—based on "stonewalling" and "covering-up", and designed to dupe busy trial-courts into curtailing discovery without good cause and to the disadvantage of justice.

The District Court's order of 4 April 1979 provides precedent for the most perverse developments of that kind. First, it rewards the UTP for employing techniques of concealment and suppression of evidence that have long been condemned as widespread abuses, that have caused and will cause extensive delay and expense in this case, and that have prejudiced Petitioners' fundamental liberties.[58] Second, the order shows

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[58] On the types of discovery-abuses encountered in complex litigation, *see, e.g.*, Freeman, "The Attorney-Corporate Client Privilege: An Obstacle to the Pursuit of Truth", *Litigation*, Vol. 2, No. 3, at 1-2 (Spring 1976):

> Obtaining facts through corporate witnesses is always a difficult task, especially when a significant amount of time has elapsed between an event in question and the examination of those witnesses at depositions or at trial. Established programs within corporations for the periodic destruction of records eliminate one important source of evidence. Without the possibility of being impeached by written correspondence, memoranda or other documents, witnesses can safely retreat behind a lack of recollection.
>
> • • • [A]ccess to earlier recorded recollection is crucial to effective discovery. For practical reasons, discovery • • • may not occur until three to five years after the conspiracy has been unmasked, and even more years after the crucial events and conversations that were the inception of the illegal scheme. The failing memories of conspirators—real or feigned—prevent meaningful inquiry into secret agreements and conduct that were the basis of the conspiracy.
>
> The barriers to getting hard evidence • • • are formidable;

that at least one trial-court is willing to terminate discovery *sua sponte* if the parties from whom discovery is sought can give enough untruthful testimony, withhold enough documents, consume enough time—and brazenly enough defend their wrongdoing with the notion that the Federal Rules entitle the parties seeking discovery only to false and evasive testimony and incomplete production of documents.[59] And third, in conjunction with this Petition, the order indicates how procedurally difficult and costly is the aggrieved parties' only efficacious means to relief.

The District Court's order of 4 April 1979 is self-defeating, because it leaves the *first* trial (yet to be had) necessarily abortive in nature, and sets the stage for appeal to this Court, reversal and remand for further discovery, and a *second* trial. This result alone is perhaps sufficient to warrant an extraordinary writ here.[60] How necessary such a writ, then, when the District Court's order also provides precedent for other trial-courts in other cases practically to nullify the discovery-rules at the behest of the very parties against whom those rules demand unrelenting enforcement.[61]

> discovery may be frustrated by well-rehearsed, false and evasive testimony. • • • In these circumstances, the only available record of the facts is contained in statements taken from employees • • •. If these remain locked in the • • • files, the truth may never be ascertained.

[59] Such is the sole defense the UTP proffered to the District Court. *See* A. 360-61, 404.

[60] *See* Padovani v. Bruchhausen, 293 F.2d 546, 547-48 (2nd Cir. (1961). *See infra* pp. 46, 48-51.

[61] *See* Los Angeles Brush Manufacturing Corp. v James, 272 U.S. 701, 706-08 (1927); Sanderson v. Winner, 507 F.2d 477, 479 (10th Cir. 1974), *cert. denied sub nom.* Nissan Motor Corp. v. Sanderson, 421 U.S. 914 (1975).

Indeed, should this Court deny Petitioners relief, what teaching will the inferior federal courts and the trial-bar perceive other than that the Federal Rules of Civil Procedure apply only to those parties too timorous to scout them? How compelling an extraordinary writ in this case, therefore, if only to admonish lower courts and the bar that concealment, guile, sham, and obstruction find no encouragement or aid in either the Rules of their enforcement by this Court.

III. The District Court had no power to terminate Petitioners' discovery once they exposed a scheme on the part of the United Teaching Profession to give false and incomplete testimony and illegally to withhold physical evidence.

That American courts lack authority to encourage, condone, or reward litigants' suppression of evidence should be self-evident; yet here, the District Court proceeded as if the opposite were true. Its order of 4 April 1979 thus falls within that category of "extremely bad judicial decision[s]" that are "so egregiously erroneous" as to constitute an usurpation of power.[62]

As detailed in Part I.,[63] the District Court's order is inconsistent with any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, and therefore appropriately correctable by extraordinary writ.[64] The basic purpose of the Rules, after all, is to administer justice through fair trials—which compels

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[62] *In re* Estelle, 516 F.2d 480, 488 (5th Cir. 1975) (Godbold, J., concurring), *cert. denied*, 426 U.S. 925 (1976).

[63] *Supra* pp. 27-40.

[64] *See* McDonnell Douglas Corp. v. United States District Court, 523 F.2d 1083, 1087 (9th Cir. 1975), *cert. denied sub nom.* Flanagan v. McDonnell Douglas Corp., 425 U.S. 911 (1976).

the conclusion that judicially imposed impediments to the development, presentation, and determination of facts should be avoided wherever possible, not maximized as the District Court has done here.[65] To be sure, in ordinary cases, trial-courts should police their dockets to expedite litigation. This case, however, involves complex facts concerning the political activities and intentions of a huge, nationwide organization over the last eight years, together with the UTP's startling efforts to frustrate Petitioners' discovery of those facts. The District Court should have considered these unique circumstances, particularly in so far as they became known only after its order of 13 October 1978.[66] Instead, it ignored them, in deference to its own undisclosed purposes.[67]

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[65] Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373-74 (1966); IBM Corp. v. Edelstein, 526 F.2d 37, 40-41 (2d Cir. 1975).

[66] *See* Freehill v. Lewis, 355 F.2d 46, 48-49 (4th Cir. 1966).

[67] At the hearing of 2 February 1979, the Honorable Donald D. Alsop told the parties that:

> [t]here is no way to describe the reaction, I guess, to what has transpired since [the hearing and order of 13 October 1978] in the sense that obviously the case has taken an entirely different turn based upon everything I have tried to accomplish over the last three years • • •.
>
> I do not propose to hear these motions. They are going to be heard by a three-judge panel.

A. 460. The District Court held no hearing on Petitioners' motion at all, however. Neither did it ever explain how what it had "tried to accomplish over the last three years" justified denial of Petitioners' request for relief from the UTP's "cover-up".

Perhaps the Court was referring to a desire to move the case to trial. Yet, since the UTP's conduct has made extension of discovery imperative if Petitioners are to secure a full factual record, the Court's inclination to proceed with dispatch hardly rationalizes sanctions against the aggrieved parties and rewards for the malfactors. *See* Fowler v. Wirtz, 34 F.R.D. 20, 23-24 (S.D. Fla. 1963).

Whatever these purposes may be, they cannot support the District Court's termination of discovery, because of the repugnance of its order of 4 April 1979 to the Due Process Clause of the Fifth Amendment.[68] In criminal prosecutions, for example, the government may not itself solicit or use perjured testimony,[69] deliberately misrepresent the truth,[70] rely on incomplete or misleading facts,[71] allow false evidence to go uncorrected when it appears,[72] or suppress material evidence, favorable to his case, that a defendant has requested be produced.[73] The principles of due process would be self-contradictory if they denied government the power to do these things directly, yet licensed it, through judicial "discretion", to blink the same wrongdoing by civil litigants under the Federal Rules of Civil Procedure—particularly where those Rules provide the sole means by which Petitioners can assert their federal constitutional and statutory rights in the national courts.[74] Yet only such an incoherent gloss to the Due Process Clause can sustain the District Court's order of 4 April 1979.

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[68] *See* Western Electric Co., Inc. v. Stern, 544 F.2d 1196, 1198-99 (3d Cir. 1976).

[69] *E.g.*, Alcorta v. Texas, 355 U.S. 28, 30-32 (1957); White v. Ragan, 324 U.S. 760, 763-64 (1945); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935).

[70] Miller v. Pate, 386 U.S. 1 (1967).

[71] Moore v. Illinois, 408 U.S. 786, 807-10 (1972) (Marshall, Douglas, Stewart, and Powell, JJ., dissenting in part).

[72] Napue v. Illinois, 360 U.S. 264, 269 (1959).

[73] Moore v. Illinois, 408 U.S. 786, 794-95 (1972); Brady v. Maryland, 373 U.S. 83, 86-88 (1963).

[74] *Compare* Lee v. Habib, 424 F.2d 891, 901-02 (D.C. Cir. 1972), *with* Bodie v. Connecticut, 401 U.S. 371 (1971).

Even more revealing of the egregiously erroneous nature of that order is its paradoxical result in penalizing Petitioners for having suffered and exposed, and rewarding the UTP for having conceived and perpetrated, a fraud upon Petitioners and the judicial system. The UTP's illegal actions will prevent Petitioners, despite their own diligence, from fully presenting their case. Those actions, therefore, would compel a second trial in this action, let alone complete discovery to guarantee the fairness of the first trial.[75] Indeed, Petitioners would be entitled to a new trial even if the UTP had not deliberately and maliciously concealed the truth,[76] or even if the false and evasive testimony of its officials and staff-personnel had arguably little weight on the trial-court's judgment.[77] How compelling their right to relief, then, where the uncontroverted evidence exposes a deliberately planned and carefully executed scheme to defeat the administration of justice.[78] Conversely, how repellant the aid and comfort

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[75] *See, e.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 398, 420-21 (1923); United States v. Throckmorton, 98 U.S. 61, 65-66 (1878); Fiske v. Buder, 125 F.2d 841, 849 (8th Cir. 1942).

[76] *See* Bros Inc. v. W.E. Grace Manufacturing Co., 351 F.2d 208, 210-11 (5th Cir. 1965), *cert. denied*, 383 U.S. 939 (1966).

[77] *See* Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, 147 (7th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Atchison, T. & S.F. Ry. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957).

[78] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245-47 (1944). The involvement of "NEA's attorneys" in this scheme raises particularly serious issues. *Compare and contrast* Petry v. General Motors Corp., Chevrolet Division, 62 F.R.D. 357, 358-61 (E.D. Pa. 1974).

Hazel-Atlas Glass Co. explodes the UTP's recurrent argument that Petitioners sought relief "too late". *E.g.*, A. 335, 346-47, 348-51, 356, 361-62. As this Court said in that case,

> [w]e cannot easily understand how, under the admitted facts,

the District Court has given the UTP's "cover-up", when Petitioners' unrefuted demonstration supports the harshest of sanctions under Rule 37, not tacit approbation.[79]

In short, no source of judicial power under the Federal Rules of Civil Procedure or the United States Constitution subtends the District Court's order of 4 April 1979. Undoubtedly, the UTP is unwilling to make full discovery in this case; but neither that reluctance, nor a judicial *fiat* such as the latter order, can deprive Petitioners of their right, founded on the necessities of litigation and the requirements of justice, to the evidence necessary to vindicate their constitutional freedoms in court.[80]

> Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone. • • • [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 246. *Accord,* Estate of Murdoch v. Pennsylvania, 432 F.2d 867, 870 (3d Cir. 1970).

[79] *See, e.g.,* United States v. Moss-American, Inc., 78 F.R.D. 214, 215-17 (E.D. Wis. 1978).

[80] *See Ex parte* Uppercu, 239 U.S. 435, 439-40 (1915); Olympic Refining Co. v. Carter, 332 F.2d 260, 264-66 (9th Cir.), *cert. denied,* 379 U.S. 900 (1964).

IV. Absent immediate intervention by this Court, the District Court's order of 4 April 1979 will irreparably prejudice the vindication of Petitioner's constitutional freedoms.

Irreparable injury to Petitioners is an unavoidable consequence of the District Court's usurpation of power in prematurely terminating discovery of the UTP's political activities. The District Court's order of 4 April 1979 forecloses relief through pre-trial investigations under the discovery-rules.[81] In addition, a trial under the present circumstances will likely prove useless.[82]

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[81] *Contrast* Kerr v. United States District Court, 426 U.S. 394, 404-06 (1976); Southern California Theatre Owners Ass'n v. United States District Court, 430 F.2d 955, 956 (9th Cir. 1970).

The District Court denied Petitioners' motion to reconsider that order. A. 471-72. Thus the Court has provided the UTP with an opportunity to purge its files of incriminating documentation, to coach potential witnesses, and to prepare new subterfuges to defeat exposure of its political involvement.

[82] Although not dispositive, the uselessness of a trial is a consideration to be weighed in the exercise of supervisory power under the All Writs Act. *See Ex parte* Skinner & Eddy Corp., 265 U.S. 86, 95-96 (1924).

Such a consideration is peculiarly apt here, in light of the District Court's manifest hostility to a trial, as expressed at the hearing of 2 February 1979:

> THE COURT [*per* the Honorable Donald D. Alsop]: Help me as to how you feel I get the facts before the three-judge panel?
>
> MR. MILLER [counsel for the UTP]: Judge, if we can't do it——
>
> THE COURT: You say you can't. Tell me how you propose to do it?
>
> MR. MILLER: If we cannot do it by way of stipulation of facts I would propose that we are either going to have some

At trial, Petitioners will be unable to compel attendance of those witnesses who work in the UTP's national headquarters in Washington, D.C., and who testified falsely or evasively in depositions.[83] Arguably, Petitioners might be able to require the UTP to produce various documents pursuant to a subpoena *duces tecum*; but the attitude regarding document-production under Rule 34 embodied in the District Court's order of 4 April 1979 renders this possibility slim.[84]

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supplemental live testimony • • • , that failing a stipulation of facts what can we do besides having a full-blown trial.

THE COURT: I can tell you you are not going to have a full-blown trial, I can tell you that.

MR. MILLER: That is my understanding.

THE COURT: All of you dispossess yourselves of the idea that there is going to be testimony in this case because based on my informal conversations with the other judges, I can tell you that is not going to happen.

A. 464-65. An extraordinary writ, of course, is the remedy of choice where a jury-trial, such as Petitioners demanded in their amended complaint, is illegally denied. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501-11 (1959); *Ex parte* Peterson, 253 U.S. 300, 305-06 (1920); *Ex parte* Simons, 247 U.S. 231, 239-40 (1918); *In re* Zweibon, 565 F.2d 742, 745-46 (D.C. Cir. 1977); Lee Pharmaceuticals v. Mishler, 526 F.2d 115, 116-17 (2d Cir. 1975); Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir. 1971), *cert. denied*, 404 U.S. 852 (1971); Bruce v. Bohanon, 436 F.2d 733, 735-36 (10th Cir.), *cert. denied*, 403 U.S. 918 (1971); *see* Thompson v. Board of Educ., 476 F.2d 676, 677-78 (5th Cir. 1973) ("[w]hen this case was set for trial • • • the parties were informed that there would be no trial in the sense of hearing witnesses or taking evidence").

[83] *See* Federal Rule of Civil Procedure 45(e).

[84] *Cf.* 4A *Moore's Federal Practice* ¶ 34.06, at 34-44 & nn.18-19 (1978). That Petitioners could subpoena documents at trial, however, does not militate against the relief they seek here. *See* Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 140-45 (8th Cir. 1968).

In any event, Petitioners need, not documents alone, but documents explained by the candid testimony of those officials and staff-personnel of the UTP knowledgeable about the activities the documents record. Yet, without particular documents to force them into admissions, such witnesses from the UTP as Petitioners can summon to trial will have no more incentive to testify candidly than did previous deponents.[85] And without the clarifying testimony of particular individuals, such documents as Plaintiffs can obtain hereafter will be less probative than they could be.

Furthermore, the success of their constitutional claims depends on the quantity, as well as the quality, of evidence Petitioners adduce. If Petitioners prove that political involvement is essential to the achievement of the UTP's goals, they will establish its disqualification, under the First and Fourteenth Amendments, to impose itself as their "spokesman" or "sponsor" under color of Minnesota law.[86] The conclusion that the UTP is a political-action organization, though, rests upon the totality of the circumstances surrounding its activities and intentions.[87] And the very concept of "totality" implies that the sheer mass of proofs available is important.

If the UTP's "cover-up" prevents a jury from finding that it is a political-action organization, the District Court must enter judgment against Petitioners. On appeal, this Court will inevitably reverse and remand—not, however, for another trial that could ac-

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[85] A. 195-97 & n.89, 249-51 & n.106.

[86] *See* Elrod v. Burns, 427 U.S. 347, 355 (1976) (opinion of Brennan, J.).

[87] Vieira, *supra* note 10, 27 *DePaul L. Rev.* at 344-49.

complish nothing, but for further discovery to purge the case of the UTP's pre-trial wrong-doing. Whether that discovery succeeds, though, will depend upon the fortuitous availability of witnesses and the extent of their detailed recall of events that transpired years before, and upon the existence of documents that Petitioners know the UTP is now destroying.[88] If its already exposed scheme of suppressing evidence portends future events, by the time discovery begins again on remand after appeal to this Court, the UTP will have perfected its "cover-up" and forever precluded Petitioners from collecting the evidence to which they are entitled.

This result alone justifies the issuance of an extraordinary writ now, before it is too late.[89]

V. By denying Petitioners the opportunity to develop a complete factual record in support of their constitutional claims, the District Court's order of 4 April 1979 will defeat this Court's appellate jurisdiction over those claims.

The Court of Appeals for the Eighth Circuit held that Petitioners' amended complaint raises substantial constitutional questions.[90] And this Court has repeatedly premonished litigants that constitutional issues are almost never ripe for decision absent a detailed

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[88] A. 190-92.

[89] *See* Pfizer v. Lord, 456 F.2d 545, 547-48 (8th Cir. 1972); United States v. Hemphill, 369 F.2d 539, 543 (4th Cir. 1966); Atlass v. Miner, 265 F.2d 312, 313 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960); *cf.* De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 216-17 (1945).

[90] Knight v. Alsop, 535 F.2d 466, 469-70 (8th Cir. 1976).

factual record."[91] These decisions mandate complete discovery in this case. Furthermore, what constitutes *complete* discovery under the peculiar circumstances here is a matter for Petitioners, not the trial-court, to decide."[92] The District Court, however, has exceeded its authority under the Federal Rules of Civil Procedure, and ordered that Petitioners have less-than-complete discovery notwithstanding their unrefuted demonstration of the UTP's suppression of evidence.

The potential effect of the District Court's order of 4 April 1979 is two-fold: First, if it precludes a jury from finding that the UTP is a political-action organization, the order will foreclose immediate appellate review by this Court of the fundamental constitutional issue of whether, consistently with the First Amendment, such an organization can impose itself as the "spokesman" or "sponsor" of dissenting faculty-members in a public institution of higher education. Second, even after this Court reverses a trial-court judgment against Petitioners, and remands for further discovery and factual findings, the order may still defeat appellate review of the merits by affording the UTP sufficient time to perfect its "cover-up" through destruction of documents and coaching of witnesses.

The potential frustration of this Court's exclusive appellate jurisdiction by the District Court's order of 4 April 1979, then, presents a classic situation for in-

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[91] *E.g.*, Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974); Socialist Labor Party v. Gilligan, 406 U.S. 583, 586-87 (1972); Cogwill v. California, 396 U.S. 371, 372 (1970) (Brennan and Harlan, JJ., concurring); Shaffer v. Heitner, 433 U.S. 186, 220-22 (1977) (Brennan, J., concurring and dissenting).

[92] *See* Dennis v. United States, 384 U.S. 855, 873-75 (1966).

tervention by extraordinary writ.[93] Petitioners, after all, are not requesting this Court to review the constitutional merits of their case now—but instead to remove obstructions the District Court has imposed so that they can develop the factual record necessary for this Court to address the merits hereafter.[94]

In sum, material evidence exists within the exclusive control and knowledge of the UTP, its officials, staff-personnel, and attorneys. Throughout the course of this litigation, the UTP has illegally withheld or falsified evidence. And although Petitioners have exposed the UTP's wrongdoing, without refutation on its part, the District Court has sanctioned that malfeasance anyway through its order of 4 April 1979. That order, however, is inconsistent with any tenable interpretation of Federal Rules of Civil Procedure 16, 26, 30, 34, and 37, or of the Fifth Amendment to the United States Constitution, and exceeds any trial-court's authority to limit discovery. Furthermore, if

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[93] *See* United States v. United States District Court, 334 U.S. 258, 263 (1948); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943); United States v. Beatty, 232 U.S. 463, 467 (1914); McClelland v. Carland, 217 U.S. 268, 280 (1910); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 525-26 (D.C. Cir. 1975). As the Circuit Court said in *Colonial Times, Inc.*,

> resolution of this issue of discovery may be significant to the particular case under review. The availability of depositions • • • may determine the state of the record presented to the District Court for decision and to this Court for review. If the record is inadequate, as it seemingly would be, then the [discovery] issue could well be controlling in the litigation. • • • [D]iscovery issues of the sort raised by this case • • • are often collateral to the litigation and thus lost to appellate review in fact if not in theory.

[94] *Compare and contrast* Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1310, ——, 98 S. Ct. 2, 4 (1977) (Rehnquist, Circuit Justice).

not vacated, the order will irreparably injure Petitioners by denying them evidence necessary to the vindication of their First-Amendment liberties; will defeat this Court's exclusive appellate jurisdiction over a constitutional issue of substantial consequence and public interest; and will encourage wholesale disregard of the discovery-rules by every civil litigant with something to hide and the temerity to hide it. Under these circumstances, therefore, an extraordinary writ from this Court is necessary.

PRAYER FOR RELIEF

On the basis of the foregoing, Petitioners pray that this Court issue an extraordinary writ in the nature of mandamus and prohibition, commanding the Honorable Gerald W. Heaney, Earl R. Larson, and Donald D. Alsop, United States Circuit and District Judges, respectively, sitting as a three-judge United States District Court in the District of Minnesota,

A. To vacate their order of 4 April 1979;

B. To vacate the order of 13 October 1978 issued by the Honorable Donald D. Alsop; and

C. To order that Petitioners have the discovery they requested in their Motion to Rescind the Court's Order of 13 October 1978, made before the three-judge District Court and denied in its order of 4 April 1979, together with such further discovery and other relief as may be warranted under the circumstances then prevailing.

Respectfully submitted,

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16 July 1979

VERIFICATION OF COUNSEL

Edwin Vieira, Jr., being first duly sworn, deposes that he is counsel for Petitioners herein; that he has read the foregoing Petition for Extraordinary Writ; and that, to the best of his information and belief, the facts therein stated are true.

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EDWIN VIEIRA, JR.

Sworn and subscribed to before me this sixteenth day of July, 1979.

_____

NOTARY PUBLIC

My Commission expires _____.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rules 31(1), 33 (1), and 36(1) of the Rules of this Court, I have served three copies of Petitioners' Motion for Leave to File Petition for Extraordinary Writ, Petition for Extraordinary Writ, and Appendices on each of the following Respondents or Counsel for Respondents, by mailing said copies to the addresses listed below, first-class postage-prepaid priority mail.

The Honorable Gerald W. Heaney
The Honorable Earl R. Larson
The Honorable Donald D. Alsop
c/o Mr. Gerald Berquist,
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Done this sixteenth day of July, 1979.